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Nos. 87-470 and 87-614

In The

Supreme Court of the United States

October Term, 1987

No. 87-470

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, et al.,
Respondents.

No. 87-614

RONALD W. SAPPENFIELD, FANTASY ONE, INC., and FANTASY TWO, INC.,
Petitioners,

vs.

STATE OF INDIANA,
Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT AND COURT OF APPEALS OF THE STATE OF INDIANA

BRIEF AMICUS CURIAE OF TOM COLLINS, AS COUNTY ATTORNEY FOR THE COUNTY OF MARICOPA, STATE OF ARIZONA, IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

Your amicus curiae is the Honorable Tom Collins, duly elected County Attorney for Maricopa County, Arizona. He is the chief law enforcement officer of the county, with criminal prosecution authority over felonies and misdemeanors. He also represents the county in all civil matters.

Arizona's organized crime and fraud statutes (RICO), A.R.S. § 13-2301, et. seq., as applied to obscenity offenses, was partially invalidated by the Arizona Court of Appeals in State v. Feld, 745 P.2d 146 (Ariz.App. 1987) cert. denied, ____ U.S. ____ 1988. Feld is presently pending in the Arizona Superior Court for further proceedings

under remaining obscenity and RICO indictments. The trial court, whose invalidation the Arizona Court of Appeals upheld, retains jurisdiction.

The Indiana RICO statute before this Court is substantially similar to the Arizona statute partially invalidated in Feld. If this Court holds that the Indiana RICO statute is constitutional (as it should), the Arizona courts retain jurisdiction over Feld to reconsider its federal constitutional ruling invalidating the Arizona statute.

SUMMARY OF ARGUMENT

I. The Use Of RICO With Obscenity Offenses Is Supported By The Purpose of RICO And Passes Muster Under The United States Constitution.

II. The Purpose Of RICO Is Not To Restrain Protected Speech. Any Impact On Speech Is Incidental To Lawful Non-speech Related Enforcement.

III. First Amendment Interests Are Adequately Protected By Forcing The Prosecution To Prove The Predicate Offense Of Obscenity Before Defendants Can Be Convicted of Racketeering.

LAW AND ARGUMENT

I. THE USE OF RICO WITH OBSCENITY OFFENSES IS SUPPORTED BY THE PURPOSE OF RICO AND PASSES MUSTER UNDER THE U.S. CONSTITUTION.

Congress and various state legislatures have added obscenity to their RICO statutes in order to fulfill the goals of RICO -- fighting organized crime -- not as a device to suppress protected material or to chill protected speech.[1]

Several reports, including the California Attorney General's 1987

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[1] CONG.REC. § 433-458 (daily edition, Jan. 30, 1984) (statement of Sen. Helms). Senator Helms, in introducing the amendment that added "dealing in obscene matter" to the federal RICO statute, put into the record material showing the profits organized crime gains from the sale of illegal obscenity, and reiterated that RICO was intended to provide "a means of dealing with organized crime." Id. at § 433.

Report on Organized Crime in California and the Final Report of the Attorney General's Commission on Pornography, have concluded that organized crime is behind most of the production and distribution of illegal, obscene pornography. The California report estimated that nationwide revenues from pornography range from $7 billion to $10 billion annually, "and organized crime is believed to be connected to most of this money." Attorney General's Report on Organized Crime in California at 7 (1987). It also concluded that "pornography was a lucrative part of organized crime operations" in California in 1986. Id. The Attorney General's Commission on Pornography endorsed the FBI's 1978 findings that ". . .

organized crime involvement in pornography . . . is indeed significant, and there is an obvious national control directly, and indirectly, by organized crime figures of that industry in the United States. Few pornographers can operate in the United States independently without some involvement with organized crime. The huge profits gathered by organized crime in this area and redirected to other lucrative forms of crime, such as narcotics and investment in legitimate business enterprises, are certainly cause for national concern . . ." Final Report of the Attorney General's Commission on Pornography, at 1071. These conclusions were important factors in the decisions of Congress and the various states to amend their

RICO statutes by including obscenity as a predicate offense.

Indeed, this Court has recognized that the purpose of the federal RICO statute is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). Its provisions are to be construed liberally to bring about its remedial purposes. United States v. Turkette, 452 U.S. 576 (1981). One of the most important of those remedies is the forfeiture of assets. Russello, supra. To effectuate this same purpose, the Indiana RICO statute should be liberally construed to accomplish its remedial intent.

A. <u>The purpose of RICO is not to restrain protected speech. Any impact on speech is incidental to lawful non-speech related enforcement activities.</u>

The use of RICO statutes in obscenity proceedings does not unconstitutionally restrain speech. Defendants may continue to sell or exhibit non-obscene material as long as they do not use the proceeds, instrumentalities, or property of past criminal activities.

The reasoning of Petitioners in the instant case, put into practice, would lead to absurd results. Under those arguments if a premises is used to sell narcotics or forged documents, but also sells magazines, that property is immune from forfeiture and the "enterprise" cannot be dissolved. Racketeers could simply enter the

magazine business to avoid RICO forfeitures.

The record herein makes clear that Indiana's purpose is not to use RICO to restrain future expressive activities, but seeks the dissolution of an "enterprise" or forfeiture of property because of past criminal conduct. The penalties are imposed for reasons unrelated to the suppression of speech.

Obviously, some inconvenience to speech is caused by all criminal laws, including RICO. In every case where a person is imprisoned for distributing obscenity, the imprisonment limits that criminal's ability to distribute communicative material, as two justices of this Court noted in Vance v. Universal Amusement Co., 445 U.S. 308, at 320, 324 (1980) (Justices White and

Rehnquist). See also Arcara v. Cloud Books, ___ U.S. ___, 106 S.Ct. 3172, 92 L.Ed.2d 568, 577 (1986) (". . . every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.") But under Petitioners' reasoning, a person could engage in the RICO predicate offenses of prostitution, restraint of trade, or trafficking in stolen property at a commercial establishment which also sells paperback novels, and this would immunize the establishment from forfeiture. This would obviously provide a loophole for organized crime to avoid the intended impact of RICO and defeats the purpose of the statute.

This Court has repeatedly recognized that it does not abridge

freedom of speech to make a course of conduct -- in this case racketeering -- illegal, even though the conduct is in some respect carried out by means of expression. Cox v. Louisiana, 379 U.S. 559, at 563 (1966) (". . . it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." Quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490 at 502, 93 L.Ed. 834 at 843-44 (1949)).

Arcara v. Cloud Books, supra, is squarely on all fours. There, this Court upheld the closure of a pornography bookstore that was also

used as a place of prostitution. Like the Indiana RICO statute, the nuisance abatement legislation in Arcara was concerned with unlawful conduct and only incidentally related to expression. This decision is directly on point: "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal use of premises." 92 L.Ed.2d at 578. So long as there is no "speech suppressive motivation or policy" shown in the enforcement of the RICO statute it is constitutional. 92 L.Ed.2d at 578 N.4 (emphasis added). The Indiana RICO statute is applicable to all enterprises or property used in racketeering activity -- not just obscenity.

The Indiana Supreme Court recognized this stating that "the purpose of the forfeiture provision is totally unrelated to the nature of the assets in question." 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 565 (Ind. 1987). The remedies provided in RICO "are a legitimate tool in the attack on racketeering activity." Id. To find otherwise would allow persons to thwart the law by effectively shielding their enterprise "behind a pseudo-constitutional barrier." Id. Because RICO is an attempt to compel forfeiture of property used in racketeering activity and "not to restrain the future distribution of expressive materials" the Court held that RICO, as it pertains to the "predicate offense of obscenity" does

"not violate" the First Amendment. Id.

Where the purpose of a statute is unrelated to the suppression of speech, as with RICO, there are many circumstances which permit closure of businesses engaged in expressive activity. Closure of nonconforming adult bookstores and theatres is permitted under amortization provisions of "adult use" zoning ordinances. Hart Bookstores v. Edmisten, 612 F.2d 821, 830 (4th Cir. 1979), cert. denied, 447 U.S. 929 (1980); Northend Cinema Inc. v. Seattle, 585 P.2d 1153, 1160 (1978), cert. denied sub. nom. Apple Theatre v. Seattle, 441 U.S. 946 (1979). The denial of a license to open or operate an adult bookstore or theatre has been

upheld where denial was based on a prior prostitution, child pornography, indecent exposure, or obscenity conviction. Dumas v. City of Dallas, 648 F.Supp. 1061, 1073 (N.D.Tex. 1986), upheld at ____ F.2d ____ (5th Cir. 1988) (relying on Arcara, supra); also see 106 Forsyth Corp. v. Bishop, 482 F.2d 280, 281 (5th Cir. 1973), cert. denied, 422 U.S. 1044 (1975); Barrago v. City of Louisville, 456 F.Supp. 30, 32 (W.D.Ky. 1978); Airport Bookstore, Inc. v. Jackson, 248 S.E.2d 623 (Ga. 1978), cert. denied sub. nom. Gateway Books v. Jackson, 441 U.S. 952 (1979); West Gallery Corporation v. Salt Lake City Board of Commissioners, 586 P.2d 429 (Utah 1978). In Commonwealth v. Croatan Books, 323 S.E.2d 86 (Va. 1984), the

Virginia Supreme Court upheld a bookstore's closure based on evidence that homosexuals congregated there to engage in sexual acts -- even though there was "no evidence" that the store sold obscene material -- because the closure was "based on criminal activities occurring at the site." 323 S.E.2d at 89.

Indeed, other cases have upheld closure of bookstores under abatement of nuisance statutes because of illegal conduct unrelated to expression. See e.g. Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923 (1975), dismissing the appeal from State ex rel. Ewing v. "Without a Stitch", 307 N.E.2d 911 (Oh.1974); State, ex rel. Kidwell v. U.S. Marketing, Inc., 631 P.2d 622, 25 ALR 4th 381 (Id. 1983), jurisdiction

noted 454 U.S. 1140, 71 L.Ed.2d 291, 102 S.Ct. 996, and appeal dismissed by U.S. Marketing, 455 U.S. 1009, 71 L.Ed.2d 878, 102 S.Ct. 1649 (the Supreme Court of Idaho held that a one-year closure order under a nuisance abatement statute for a leased bookstore property did not constitute an unlawful prior restraint on speech.)[2] These cases, like ours,

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[2] This Court sought to address the issue of closure as a remedy in obscenity nuisance orders in Kidwell, supra, jurisdiction noted, 454 U.S. 1140 (1982). After an arson fire destroyed the bookstore, its owners filed for unilateral dismissal of their appeal, which was granted by the Clerk over the objection of the State of Idaho. 455 U.S. 1009 (1982). This was not a dismissal "by stipulation of parties," as indicated in Avenue Book Store v. City of Tallmadge, Ohio, 459 U.S. 997, 74 L.Ed.2d 393 at 394 (1982) (Justice White dissenting from denial of writ of certiorari). See also: U.S. Marketing v. Leroy, 524 F.Supp. 1277 (D.Idaho 1981).

are situations where speech is interfered with incidentally during punishment for past illegal and unprotected conduct.

It is readily apparent that simply because a person's speech is restrained or inconvenienced as the unintended and incidental result of a legitimate statute does not create an unconstitutional prior restraint on speech. As with most criminal statutes, every one of the predicate offenses under any RICO statute can arguably result in incidental suppression of speech. This is particularly so if the property used in the racketeering activity is a store that sells expressive materials. Petitioners' interpretation of the First Amendment would lead to the absurd result of invalidating use of

RICO whenever criminals put their money into such an "enterprise," and for that reason should be overturned. United States v. Powers, 307 U.S. 214, 217, reh'g denied, 308 U.S. 631 (1939).

The criminal nature of an "enterprise" can be proven as neutrally through sale of illegal obscenity as through sale of illegal drugs, guns, or forged documents (which is also speech). As long as the legislation is directed at unlawful conduct, and not motivated by suppression of speech, its purpose cannot be frustrated because the criminal activity is intertwined with expression.

Like prostitution in Arcara, the sale of obscenity is illegal conduct that a state may prohibit. Roth v. United States, 354 U.S. 476 (1957). The Indiana RICO statute is narrowly

drawn in its application since it imposes sanctions only on the sellers of obscenity, defining obscenity by the Miller standard.[3] As the Indiana Supreme Court recognized below, the state has an important societal interest in halting the flow of money into organized crime from the sale of obscenity. Goldsmith, 504 N.E.2d at 564. Any alleged impact on non-obscene pornography is incidental to that interest. See Arcara, 926 L.Ed.2d at 577, 578. It is not the motive or purpose of the law. Thus, even if the sale of pornography is intertwined with the sale of obscenity and is incidentally impacted, the result is not an unconstitutional prior restraint.

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[3] See Ind. Code § 35-49-2-1 defining obscene matter using the Miller test.

cf. Arcara, supra; Cox, supra.

B. First Amendment interests are adequately protected by forcing the prosecution to prove the predicate offense of obscenity before defendants can be convicted of racketeering.

It is critical to recognize that no one can be convicted of "racketeering" in this context until they have been proven guilty of selling illegal, unprotected, obscene matter. The Indiana obscenity statute clearly passes constitutional muster. Sedelbauer v. State, 428 N.E.2d 206 (Ind. 1981), cert. denied, 455 U.S. 1035 (1982); Ford v. State, 394 N.E.2d 250 (Ind.App. 1979). The Indiana obscenity statute gives "adequate warning of the conduct proscribed" so as to permit the law to be fairly administered. See Roth v.

United States, 354 U.S. 476, 491 (1957).

By requiring the state to meet the initial burden of proving the obscenity offense, it is established that a defendant is engaged in an illegal, unprotected activity. It should make no difference what criminal activity triggers the RICO sanctions or what "enterprise" the profits have been poured into. The intent is not to suppress speech, but to deter racketeering activities. Selling "obscene" matter has no more constitutional protection than any other RICO predicate offense.

CONCLUSION

For the foregoing reasons this Court should uphold the decision of the Indiana Supreme Court in 4447 Corp. v.

Goldsmith, 504 N.E.2d 559 (Ind. 1987) and find that the Indiana RICO law, as applied to obscenity offenses, passes constitutional muster.

Respectfully submitted,

Thomas E. Collins
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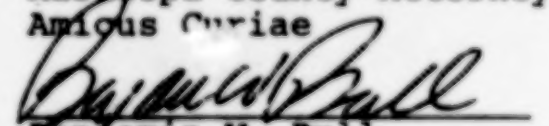
Amicus Curiae

By: 
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